IN THE

# Supreme Court of the United States

October Term, 1970

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No. 751

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MARJORIE WEBSTER JUNIOR COLLEGE, INC.,
*Petitioner,*

v.

MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, INC.,
*Respondent.*

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## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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## INTRODUCTION

Petitioner Webster submits this reply to respondent Middle States' brief in opposition in order to clarify the issues in this case and to correct misstatements in respondent's brief which might mislead this Court. Petitioner will not respond to each argument in the opposition, seeking to confine this reply to only the more

critical errors in respondent's brief. These errors will be considered in the order in which they appear in the brief.

A. Injury to Webster

Middle States contends that the petition should be denied because "Webster concedes that Webster 'has operated successfully as a junior college since 1947'."

This contention is erroneous in at least two respects.

*First*: Webster has consistently maintained throughout this proceeding that no institution can consider itself successful when it is stigmatized as inferior by lack of regional accreditation. Similarly, Webster has consistently contended that its operation cannot be considered successful when its graduates are unable to transfer their credits to senior institutions because of a lack of accreditation. Contrary to Middle States' assertion, there is nothing in the record to support the claim that Webster has conceded that is has operated successfully.

*Second*: Even if Webster had conceded that it has operated successfully (which it has not), this would not warrant denial of the petition. Ironically, Middle States seems to equate success with profitable operation. Webster concedes that it has realized a profit from its operations in the past. The fact that this has occurred does not, however, foreclose Webster from asserting its rights under the antitrust laws and the Constitution. Middle States seems to contend that bankruptcy is a condition precedent to assertion of these rights. This is patently erroneous. Under the antitrust laws, a plaintiff need merely demonstrate a dangerous probability of loss or damage to prevail--destruction of the plaintiff's enterprise is not required' *United States v. Borden Company*, 347 U.S. 514, 518 (1954). No citation is required to

demonstrate that a plaintiff need not show red ink on its income statement to assert a constitutional right.

In short, the issue is not whether Webster has successfully operated a junior college, but whether it has been injured by Middle States' activities. This injury is manifest when the junior college is stigmatized by lack of accreditation, when high school students are counselled to avoid unaccredited schools, when Webster's students experience great difficulty in transferring credits and are denied the benefits of the College Work-Study and National Defense Student Load programs.[1] Indeed, elements of this injury were recognized by the Court of Appeals.[2]

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[1] See Petition pp. 11-12. Middle States considers it significant that "Webster has not sought to participate in these programs . . ." (Opposition, p. 12). As Middle States knows, Webster has not sought participation in such programs because *it is ineligible to do so since it lacks Middle States' accreditation* (See Petition, p. 12, fn. 6-8). The argument is specious. Respondent's discussion of other aspects of federal program is also misleading. The reference to the Higher Education Amendments of 1968 (Opposition p. 12) and the quotation of the statute in respondent's Appendix (A-2) implies that Webster could obtain an acceptable alternative to accreditation via approval by an Advisory Committee established by the U.S. Commissioner of Education for schools as to which there is no accreditation available from a nationally recognized accrediting agency. The quoted portion of 20 U.S.C. 1085(b) omits clause (4) which limits the Advisory Committee procedure to "public or other non-profit institutions." It should also be noted that where proprietaries are eligible for benefits under the National Defense Education Act of 1958, as amended, 20 U.S.C. 403(b) (embracing definition of "proprietary institution of higher education" set forth in 20 U.S.C. 1088(b)), *such Advisory Committee procedure is specifically excluded.*

[2] "We recognize, as the trial court found, that lack of accreditation may be a not insignificant handicap to appellee both in the effect that such lack may have on students considering application for admission, and in the loss of the substantial benefits that the accreditation process itself has upon the institution under study." (App. A-10).

**B. Antitrust**

Middle States persists in its contention that its activities are exempt from the antitrust laws. In so doing, it has not even attempted to resolve the demonstrated confusion and inconsistency within the District of Columbia Circuit concerning the significance of an antitrust defendant's motives. (Petition, pp. 18-19). Similarly, Middle States seeks to distinguish the AMA case by urging that the AMA had predatory motives which contrast sharply with the alleged purity of Middle States' motives. This argument does not even come to grips with the *doctrine* of the AMA case, which is that the character of the defendant organization "... is of no significance, for Section 3 prohibits 'any person' from imposing the proscribed restraint." *American Medical Association v. United States*, 317 U.S. 519, 528-529 (1943).

This question of antitrust immunity for organizations such as Middle States should be resolved by this Court.

**C. Reasonableness**

Webster refrained from arguing the question of reasonableness in its petition, since it has not asserted the need for review of this substantive determination as an independent basis for certiorari. Middle States has argued the issue at length in its opposition (pp. 21-25). This factual issue seems irrelevant to consideration of the petition for certiorari.

**D. The Common Law Issue**

Webster has no occasion to reply to Middle States' argument concerning the common law issue (pp. 26-27), since the circuit court's decision on this issue was not raised in the petition as a reason for granting certiorari.

**E. The Constitutional Issue**

Middle States has chosen to ignore the two central constitutional issues which Webster raised in its petition: (1) whether a private association exercising governmental powers should be judged by a constitutional standard more lenient than that applicable to the government, and (2) whether Middle States' discrimination against proprietary institutions should be judged by the traditional equal protection test or the "compelling interest" test. These are important questions which warrant Middle States' comments. They have been ignored.

Instead, Middle States has merely asserted (1) that its activities do not involve state aciton, (2) that Webster did not raise the equal protection argument below, and (3) that since Webster operates a proprietary institution and seeks to "make money," its right to teach is not protected by the First Amendment. These diversions will be considered serially below:

(1) The Court of Appeals assumed without deciding that Middle States' functions constituted "state action." Compelling support for this assumption is found in the facts. The accrediting function is inherently governmental and is in fact practiced in varying degrees by the states of the United States and most foreign governments. Middle States has acted and continues to act as a "service agency" for federal and state governments to identify institutions eligible for government benefits. This function is recognized in statutes of the states and the United States, and is comparable to a delegation of power to an administrative agency. Middle States' accreditation process results in a large degree of control over curriculum, faculty and administration of federal and state institutions, including federal service academies. (Petition, pp. 12-15). See *Louisiana High School Athletic Association v. St. Augustine High School*, 396 F. 2d 224 (5th Cir., 1968).

(2) Contrary to Middle States' assertion, Webster's equal protection argument was raised in both the district and circuit courts. Indeed, in Webster's brief to the Court of Appeals, an entire section of its argument was devoted to the proposition that its rights to due process and equal protection of the law had been violated.[3]

(3) The close of respondent's opposition borders on the ludicrous. It urges that the First Amendment "does not guarantee the right to make money" and that since Webster "makes money," it may not claim the protection of this most precious guarantee. Clearly, Webster does not assert a First Amendment right to make money. It asserts the right to operate a junior college without inhibition by unreasonable government action. This right to teach effectively is protected by the guarantee of free speech. (Petition, p. 25, fn. 26). Middle States suggests that an educational institution is entitled to First Amendment rights only if it is operated on a non-profit basis. Such an argument shows that Middle States is so obsessed with an aversion to proprietary enterprise in higher education that it denies such enterprise the most fundamental of our freedoms.

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November 2, 1970

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[3] Brief of appellee filed Nov. 21, 1969 in the U.S. Court of Appeals for the District of Columbia Circuit, pp. 56-59.